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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 557

PERCY MCINTIRE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 15–19) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on September 15, 1954 (R. 84), and a petition for rehearing was denied on December 27, 1954 (R. 95). The petition for a writ of certiorari was filed on January 21, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether state law-enforcement officers while searching distillery premises under a valid search warrant were justified in arresting petitioner and searching his vehicle without additional warrants when he arrived on the scene under circumstances strongly indicating he was then and there occupied in the business of the illegal distillery.

2. Whether, even if the search were illegal, the federal rule of suppression applies to evidence procured solely by local law-enforcement officers acting under their own authority.

STATEMENT

After a jury trial, petitioner was convicted under each count of a five-count indictment (R. 2–3) charging various violations of the internal revenue laws relating to the keeping of a distillery and the distillation of spiritous liquors.[1] The judgment of conviction was unanimously affirmed on appeal (Pet. 15–19).

Petitioner does not challenge the sufficiency of the evidence to support his conviction but directs

[1] Petitioner was sentenced to 2 years' imprisonment on each of counts one and two, 6 months on each of counts three and four, and 3 years on count five, all terms of imprisonment to run concurrently with each other. In addition, he was fined $100 on each of counts one and two, and $500 on count four, the fines on counts one and two, and $200 of the fine on count four to stand "committed," the remaining $300 of the fine on count four to be placed on execution or until otherwise discharged as provided by law (R. 4–5).

his allegations of error to the overruling, after hearing, of his motion to suppress certain evidence made prior to trial (R. 3–4, 6–28), which was renewed on the trial (R. 37, 40–41). The evidence on this issue may be summarized as follows:

On February 19, 1953, about 3 o'clock in the afternoon, the sheriff of Muskogee County, Oklahoma, accompanied by two of his deputies and two city police, entered a country house several miles outside the city of Muskogee (R. 9, 16, 29) under the authority of a search warrant which they had with them (R. 27, 29, 35). They found an unregistered, unposted still in full operation together with untaxed liquor, quantities of mash, and other paraphernalia of the distillery trade (R. 27, 29, 35, 42–43). They placed two persons, Ellison and Mitchell, who were present in the house, under arrest (R. 30, 36). The officers then waited.

About 7:30 o'clock that evening, at a time when it was dark outside and raining, some of the officers watching from a window saw a truck, or what was more properly referred to in the evidence as an army-type weapons carrier, turn off the state highway into the approach road, and when still some distance from the house, turn its headlights off. The officers heard the truck back up to the porch of the house and then heard the tailgate of the vehicle lowered on to the porch. They also heard a sound as though something

was being unloaded on the porch (R. 8, 13, 16, 18, 22, 26–28, 36–37, 43–44). Then, while the motor of the vehicle was still running, and the lights were still off, the officers heard petitioner ascend to the porch near the door. The officers opened the front door and placed him under arrest (R. 8–9, 16, 37). Armed with flashlights the officers could see from the porch large cartons in the bed of the truck which, on search, turned out to contain empty gallon jugs such as are used in carrying liquor (R. 23–24; see also: R. 10, 19).[2] There were also some cartons of jugs on the porch apparently unloaded by petitioner at the time he put the tailgate down (R. 44).

Following his arrest, petitioner told the county and city officers that (R. 44) "the outfit didn't belong to him, that it belonged to a fellow that was sick." He then agreed to lead the officers to this man in Tulsa, Oklahoma. He aided the officers in apprehending George Montgomery, a co-owner of the distillery (R. 44, 56–57), who testified on the trial that petitioner owned one-third interest in the illegal business, had shared in setting it up, and helped operate it (R. 50–52).

The day following, the local officers, after consultation with federal authorities, turned the case over to them (R. 19, 20–21). There had been no

[2] The truck had a boom and winch mounted on it for lifting heavy weights (R. 41–42, 54). It was developed on the trial that petitioner used this vehicle for hauling liquor from the distillery (R. 56).

previous participation by federal authorities in the case (R. 19–20).

ARGUMENT

Petitioner does not dispute the fact that at the time of his arrest at the doorway of the distillery premises, local law-enforcement officers were engaged in making a search of those premises pursuant to a valid search warrant (see, e. g., R. 12). His contention is in essence that despite the circumstances under which he arrived on the scene the local officers had no authority to either arrest him or search his truck.

Even if federal officers had arrested petitioner and searched his vehicle, there would still be no basis to support the motion to suppress. The officers admittedly had found a distillery in full operation while making a search of the premises pursuant to a valid search warrant. While the search was in progress petitioner drove his truck up to the premises under circumstances which would justify a belief that he was engaged in the illegal enterprise. Although the night was dark and raining he turned the truck lights off as he approached the house. He then backed the truck up to the porch, and with the motor still running, lowered the tailgate and unloaded some boxes on the porch. Then he approached the door as though to enter. The officers clearly had probable cause to believe that an offense was being committed in their presence, as in fact it was, and

they were therefore entitled to make the arrest.[3] After finding the unloaded boxes and ascertaining with their flashlights that other boxes were stored in the bed of the truck, the officers were justified in making the search of the truck. Finding petitioner in *flagrante delicto* they had neither time nor opportunity to procure additional warrants. The search was clearly valid under federal law. *Brinegar* v. *United States*, 338 U. S. 160; *Scher* v. *United States*, 305 U. S. 251; *Carroll* v. *United States*, 267 U. S. 132. See also: *Browner* v. *United States*, 215 F. 2d 753 (C. A. 6); *United States* v. *Bianco*, 189 F. 2d 716 (C. A. 3).[4]

Moreover, petitioner made no showing that federal officers were involved in the arrest of petitioner or the search of his truck. The trial court was amply justified in finding that the case was not turned over to federal authorities until the day following the events in question and that federal officers had taken no part in the case up to that time. Petitioner's speculative protestations to the

[3] Since the officers were justified in believing that the offense was being committed in their presence, it is immaterial that, under Oklahoma laws, liquor offenses are misdemeanors (see Pet. 4–5). Moreover, under the circumstances, the officers clearly had reason to believe that petitioner had committed a felony under federal law and could arrest him for such offense.

[4] The evidence relating to the search of the truck which petitioner contends should have been suppressed was in fact introduced into the case by his own counsel in the cross-examination of the first government witness (R. 31–32). Cf. *Crawford* v. *United States*, 198 F. 2d 976, 979 (C. A. D. C.).

contrary are supported by no evidence of record. This Court has declared that in these circumstances the federal rule of suppression would not be applicable even if the search had been illegal. *Byars* v. *United States,* 273 U. S. 28, 33.

CONCLUSION

The decision of the court below is correct and consistent with established principles of law enunciated by this Court. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
CARL H. IMLAY,
Attorneys.

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